122-640.

(5)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 153.

THOMAS DOLAN, APPELLANT,

vs.

ABRAHAM G. JENNINGS AND WARREN P. JENNINGS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 12, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 153.

THOMAS DOLAN, APPELLANT,

vs.

ABRAHAM G. JENNINGS AND WARREN P. JENNINGS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Subpœna	1	1
Marshal's return	2	1
Bill of complaint	4	1
Appearance for defendants	26	7
Answer	27	7
Replication	48	4
Evidence for complainants	50	5
Exhibit Fringe Patent—Letters Patent No. 10388 granted A. G. Jennings, January 1, 1878	54	16
Fabric Patent—Letters Patent No. 10448 granted W. P. Jennings, February 12, 1878	57	17
No. 1—Assignment of A. G. Jennings to himself and W. P. Jennings, February 20, 1878	60	17
No. 2—Assignment of W. P. Jennings to himself and A. G. Jennings, February 20, 1878	64	18
Hearing	67	19
Consents to substitution	68	19
Notice of proposed decree	71	20
Interlocutory decree	72	20
Master's report	78	22
Notice of proposed decree	82	23

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Final decree	84	24
Stipulation as to record	87	25
Petition of appeal	89	25
Order allowing appeal	93	26
Bond	94	27
Citation	96	28
Proof of service of citation	97	28
Clerk's certificate	98	28

The President of the United States of America to Thomas Dolan, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, in equity, on the first Monday of June, A. D. 1881, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Abraham G. Jennings & Warren P. Jennings, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 27th day of April, in the year one thousand eight hundred and eighty-one, and of the Independence of the United States of America the hundred and fifth.

JOSEPH M. DEUEL, *Clerk.*

A. V. Briesen, compl'ts' sol'r.

The defendant is required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of June, 1881, or the bill will be taken *pro confesso* against him.

J. M. D., *Clerk.*

Endorsed: I hereby certify that on the 4th day of May, 1881, at the city of New York, in my district, I personally served the within subpœna upon the within-named Thomas Dolan by exhibiting to him the within original, and at the same time leaving with him a copy thereof, dated May 19th, 1881. Louis F. Payn, U. S. marshal, S. D. N. Y. B. U. S. circuit court. Filed May 20, 1881. Joseph M. Deuel, clerk.

Circuit Court of the United States for the Southern District of New York. In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Abraham G. Jennings and Warren P. Jennings, doing business at the city of New York, county and State of New York, and citizens of the State of New York, bring this their bill of complaint against Thomas Dolan, doing business in the city of Philadelphia, county of Philadelphia, and State of Pennsylvania, and who is, as your orators are informed and believe, a citizen of the United States, and thereupon your orators complain and say:

That Abraham G. Jennings, one of your orators, was and is the original and first inventor and producer of a new and original design for lace purling, fully described in the letters patent hereinafter mentioned, and which had not been known or

used before said Abraham G. Jennings' said invention and production, and which was not for more than two years before his application for a patent, as hereinafter mentioned, in public use or on sale with his consent or allowance, and which he, said Abraham G. Jennings, had invented and produced by his own industry, genius, efforts, and expense.

And your orators further show unto your honors (your orator Warren P. Jennings on information and belief) that said Abraham G. Jennings, being so as aforesaid the first inventor and producer of said new and original design for lace purling, did, on the 1st day of January, 1878, upon due application therefor, obtain letters patent of the United States for said invention in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and
6 countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, and numbered 10388, whereby there was granted and secured to said Abraham G. Jennings, his heirs, administrators, or assigns, or intended so to be, for the term of fourteen years from and after the date of said letters patent, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said invention and design as set forth in said letters patent, which, or a duly certified copy of which, is ready here in court to be produced, and by virtue whereof said Abraham G. Jennings became and was the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said letters patent.

And your orators further show unto your honors that Warren P. Jennings, one of your orators, was and is the original and first
7 inventor and producer of a new and original design for fringed lace fabric, fully described in the letters patent hereinafter mentioned, and which had not been known or used before said Warren P. Jennings' said invention and production, and which was not for more than two years before his application for a patent, as hereinafter mentioned, in public use or on sale, with his consent or allowance, and which he, said Warren P. Jennings, had invented and produced by his own industry, genius, efforts, and expense.

And your orators further show unto your honors (your orator Abraham G. Jennings on information and belief) that said Warren P. Jennings, being so as aforesaid the first inventor and producer of said new and original design for fringed lace fabric, did, on the 12th day of February, 1878, upon due application therefor, obtain letters patent of the United States for said invention, in due form of
8 law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, and numbered 10448, whereby there was granted and secured to said Warren P. Jennings, his heirs, administrators, or assigns, or intended so to be, for the term of seven years from and after the date of said letters patent, the full and exclusive right and liberty of making, constructing, using, and vend-

ing to others to be used the said invention and design as set forth in said letters patent, which, or a duly certified copy of which, is ready here in court to be produced, and by virtue whereof said Warren P. Jennings became and was the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said letters patent.

9 And your orators further show unto your honors that afterward, to wit, on or about the 20th day of February, 1878, the said Abraham G. Jennings, by an instrument in writing of that date, sold, assigned, and transfered unto your orators all his right, title, and interest in and to said invention and the letters patent No. 10388 therefor, granted as aforesaid, which said instrument in writing was duly recorded in the Patent Office of the United States, as by said instrument in writing, or a duly authenticated copy thereof, and the certificate of such recording thereto affixed, ready in court to be produced, will fully and at large appear.

And your orators further show unto your honors that afterward to wit, on or about the 20th day of February, 1878, the said Warren P. Jennings, by an instrument in writing of that date, sold,

10 assigned, and transferred unto your orators all his right, title, and interest in and to said invention and the letters patent No. 10448 therefor, granted as aforesaid, which said instrument in writing was duly recorded in the Patent Office of the United States, as by said instrument in writing, or a duly authenticated copy thereof, and the certificate of such recording thereto affixed, ready in court to be produced, will fully and at large appear.

And your orators further show unto your honors that by virtue of the premises your orators became, and now are, the sole and exclusive owners of said several letters patent and the inventions and designs described therein and of all the rights and privileges granted and secured, or intended to be granted and secured, thereby; and that since they became the owners thereof, as aforesaid, your

11 orators have invested and expended large sums of money, and have been to great trouble in and about said inventions and for the purpose of carrying on the business of manufacturing and selling lace fabrics which embody said designs, and making the same profitable to themselves and useful to the public, and that said inventions have been and are of great benefit and advantage; and that large quantities of said lace fabrics were made according to said inventions and sold by your orators, to the great advantage of the public; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orators; and your orators believe that they will realize and receive large gains and profits therefrom if infringements by said defendant and his confederates shall be prevented.

And your orators further show unto your honors that on the

12 4th day of October, 1879, your orators filed their bill of complaint in the circuit court of the United States for the district of Massachusetts against John E. Hodgkins and H. W. Beal, doing business as Hodgkins & Co.; that in their said bill they complained of the infringement by said defendants of design letters patent Nos. 10388

and 10448, being the same letters patent on which this present suit is brought, and prayed for an injunction and accounting against said defendants; that said defendants filed their answer to said bill on the 1st December, 1879, denying, amongst other things, the validity of said several letters patent, and that the complainants had any rights under the same, and setting up the non-patentability, prior knowledge, and public use of the things patented in said several letters patent; that your orators on the 29th Dec., 1879,
13 filed their application to such answer, and thereafter proofs were taken in said suits at length; that after due proceedings had said suit was reached for final hearing, and that upon due consideration thereof and after hearing arguments of counsel the court directed a decree to be entered sustaining the validity of said several letters patent and the rights of your orators under the same, and for an account and perpetual injunction against said defendants, and that said decree was duly entered and the perpetual injunctions were duly issued and served on said defendants and that the accounting under said decree is now being proceeded with.

And your orators further show unto your honors that on the 3d day of October, 1879, your orators filed their bill of complaint in this court against James H. Sayre, Joseph W. North, and
14 James E. Hedges, doing business as Sayre & North.

That in their said bill they complained of the infringement by said defendants of the aforesaid design letters patent Nos. 10388 and 10448, and prayed for an injunction and account.

That said defendants duly appeared, and that thereafter, by the advice of counsel, and after having examined into the validity of said several patents they acknowledged in writing the validity of said patents, and the rights of your orators under the same, and that such acknowledgment has been filed in the clerk's office of this court, and that said defendants have since dealt in goods which are duly licensed by your orators under said two letters patents.

And your orators further show unto your honors that on
15 the 12th day of February, 1881, your orators filed their bill of complaint in this court against Henry R. Kibbe, Edward J. Chaffee, George H. Shreve, Henry S. Stokes, Albert K. Thompson, and Henry G. Kibbe, composing the firm of Kibbe, Chaffee, Shreve & Company, of New York city.

That in their said bill they alleged infringement by said defendants of the aforesaid design letters patent Nos. 10388 and 10448, and prayed for an injunction and account; that defendants appeared by counsel, and that thereafter a motion for a preliminary injunction to restrain said defendants, as prayed in the bill of complaint, was brought to a hearing upon the affidavits and papers filed on the part of complainants and defendants, and that after argument by counsel and full consideration said motion was granted by Hon. Samuel
16 Blatchford, circuit judge; and to the original order for said injunction, and the writ of injunction on file in this court and ready to be produced, your orators crave leave to refer.

And your orators allege that said suit has been and is being defended by and at the expense of the said Thomas Dolan, the de-

fendant in this suit, and that the said Kibbe, Chaffee, Shreve & Co., as the agents of this defendant, sold the goods adjudged to be an infringement in the suit against said Kibbe, Chaffee, Shreve & Co., and that the goods so sold by said Kibbe, Chaffee, Shreve & Co. were manufactured by the defendant, Thomas Dolan.

Yet the said defendants, well knowing the premises and the rights secured to your orators as aforesaid, but contriving to injure your orators and to deprive them of the benefits and advantages which
17 might and otherwise would accrue unto your orators from said inventions ever after the issuing of the said several letters patent as aforesaid and after your orators became jointly the owners thereof and before the commencement of this suit, did, as your orators are informed and believe, without the license or allowance and against the will of your orators and in violation of your orators' rights and in infringement of the aforesaid several letters patent, at the city of New York and other places, unlawfully and wrongfully and in defiance of the rights of your orators, make, construct, use, and vend to others to be used the said inventions, and did make, construct, use, and vend to others to be used lace fabrics each made according to and employing and containing the inventions described and claimed in each of the above-named letters patent, and that said defendant and his confederates still continue so to do, and that they
18 are threatening to make the aforesaid lace fabrics in large quantities and to supply the market therewith and to sell the same all in defiance of the rights acquired by and secured to your orators as aforesaid, and to your orators' great and irreparable loss and injury, and by which your orators have been and still are being deprived of great gains and profits which they might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed, by the said defendant by and through his aforesaid unlawful acts and doings.

And your orators further show unto your honors, on information and belief, that said defendant has made and sold, and caused to be made and sold, large quantities of said lace fabrics, and has a large quantity on hand which he is offering for sale, and has made and realized large profits and advantages therefrom, but to
19 what extent and how much exactly your orators do not know, and pray a discovery thereof. And your orators say that the use of the said inventions by said defendant, in the manner aforesaid, and his preparation for and avowed determination to continue the same, and his other aforesaid unlawful acts, in disregard and defiance of the rights of your orators, have the effect to and do encourage and induce others to venture to infringe said patents in disregard of your orators' rights.

And your orators further show unto your honors that they have caused notice to be given to said defendant of said infringements, and of the rights of your orators in the premises, and requested said defendants to desist and refrain therefrom, but said defendant disregarded said notice and refused to desist from said infringements, and still continues to make and sell said lace fabrics made in

infringement of said several letters patent, after the receipt
20 of said notice, without right.

And your orators pray that said defendant, Thomas Dolan, and his and each of his servants, agents, attorneys, and workmen, and each and every of them, may be restrained and enjoined, provisionally and perpetually, by the order and injunction of this honorable court, from directly or indirectly making, constructing, using, vending, delivering, working, or putting into practice, operation, or use, or in anywise counterfeiting or imitating the said inventions, or either of them, or any part thereof, or any lace fabrics described and claimed in each or either of said letters patent made in accordance therewith, or like or similar to those which the said defendant has heretofore made; and that the said defendant may be decreed to pay the profits unlawfully obtained by him by reason of the aforesaid infringement, and the damages thereby suf-
21 fered by your orators, and the costs of this suit; and that your orators may have such further relief or such other relief as to this honorable court shall seem meet, and as shall be agreeable to equity.

And, forasmuch as your orators can have no adequate relief except in this court, to the end, therefore, that the said defendant may, if he can, show why your orators should not have the relief hereby prayed, and may, upon his corporal oath, according to his best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your orators the profit by him acquired, and the damages
22 suffered by your orators from the aforesaid unlawful acts.

May it please your honors to grant unto your orators the writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this honorable court, commanding, enjoining, and restraining the said defendant, Thomas Dolan, and his and each of his servants, agents, attorneys, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orators the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said defendant, Thomas Dolan, commanding him, by a certain day and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide such order and decree as may be made
23 against him.

And your orators will ever pray, &c.

ABRAHAM G. JENNINGS.
WARREN P. JENNINGS.

A. V. BRIESEN,
Comp'ts' Sol'r and of Counsel.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

On this 26th day of April, 1881, before me personally appeared Abraham G. Jennings and Warren P. Jennings, the above-named complainants, who, being by me severally duly sworn, depose and say that they have read the foregoing bill of complaint subscribed by them and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to those matters they
24 believe it to be true, and that they verily believe said Abraham G. Jennings and Warren P. Jennings to be respectively the first and sole inventors and producers of the new and original designs for lace purling and fringed lace fabrics described and claimed in the said several letters patent referred to in said bill of complaint.

ABRAHAM G. JENNINGS.
WARREN P. JENNINGS.

Sworn to and subscribed before me this twenty-sixth day of April, 1881.

[L. S.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed [in] N. Y. Co.

Endorsed: United States circuit court, southern district of New York. Abraham G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Bill in equity. A. V. Briesen, complainants' solicitor, 229 Broadway, New York. U. S. circuit court. Filed Apr. 27, 1881. Joseph M. Deuel, clerk.

25–26 United States Circuit Court, Southern District of New York.
In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN *et al.*

SIR: You will please enter our appearance for defendants in the above-entitled cause.

Yours, &c.,
GEORGE HARDING,
JOHN R. BENNETT,
Sol's & of Counsel for Def'ts.

Dated June 1st, 1881.

To J. M. Deuel, Esqr., clerk U. S. circuit court, so. district of N. Y'k.

Endorsed: U. S. circ't c't, so. dist. of N. Y'k. In equity. Jennings *et al.* vs. Dolan *et al.* Appearance. U. S. circuit court. Filed Jun- 1, 1881. Joseph M. Deuel, clerk.

27 United States Circuit Court, Southern District of N. Y. In Equity.

ABRAHAM G. JENNINGS & WARREN P. JENNINGS
vs.
THOMAS DOLAN.

To the honorable the judges of the circuit court of the United States in and for the southern district of New York:

The answer of Thomas Dolan, defendant, to the bill of complaint of Abraham G. Jennings and Warren P. Jennings, complainants.

This defendant, for answer to the said bill of complaint, and not answering any objections thereto, says:

I.

He admits that letters patent of the United States No. 10388 were granted to the said Abraham G. Jennings January 1st, 1878,
28 for "design for lace purling," but denies that the said Jennings was the original and first inventor and producer of the said "design for lace purling" shown, described, and claimed in said letters patent, or that the same had not been known or used by others before the date of the said alleged invention and production by the said Jennings, or that the same had not, prior to the date of the said alleged invention and production or for more than two years before his application for letters patent therefor, been in public use or on sale, or that the said Jennings invented and produced said "design for lace purling" by his own industry, genius, efforts, and expense, or that by reason of the grant of the said letters patent the said Jennings became the sole owner of the said "design for lace purling" therein shown, described, and claimed.

II.

29 He admits that letters patent of the United States No. 10448 were granted to Warren P. Jennings February 12, 1878, for "design for a fringed laced fabric," but deny — the said Jennings was the original and first inventor and producer of the said "design for fringed lace fabric" shown, described, and claimed in the said letters patent, or that the same had not been known or used by others before the date of the said alleged invention and production by the said Jennings, or that the same had not, prior to the date of the said alleged invention or production or for more than two years before his application for letters patent therefor, been in public use or on sale, or that the said Jennings invented and produced said "design for a fringed lace fabric" by his own industry, genius, efforts, and expense, or that by reason of the grant of the said letters
30 patent the said Jennings became the sole owner of the said "design for a fringed lace fabric" therein shown, described, and claimed.

III.

He has no knowledge as to the alleged assignment of February

20, 1878, from Abraham G. Jennings to the complainants, and leave complainants to make such proof thereof as they may be advised.

IV.

He has no knowledge as to the alleged assignment of February 20, 1878, from Warren P. Jennings to the complainants, and leave complainants to make such proof thereof as they may deem necessary.

V.

He has no knowledge as to whether, by virtue of the said alleged assignments, the complainants became, and are now, the sole and exclusive owners of the said several letters patent above re-
31 ferred to, and leave- complainants to make such proof thereof as they may deem necessary.

VI.

He denies, upon information and belief, that the complainants have invested and expended large sums of money, and have been to great trouble in and about said inventions, and for the purposes of carrying on the business of manufacturing and selling lace fabrics which embody said designs and making the same profitable to themselves and useful to the trade, and that said inventions have been and are of great benefit and advantage, and that large quantities of said lace fabric were made according to said inventions and sold by the complainants, to the great advantage of the public, and that the public have generally acknowledged and acquiesced in the aforesaid rights of the complainants.

32 VII.

He denies that he has in any manner or way whatsoever infringed the said several letters patent, or either of them, or that he intends or threatens so to do.

VIII.

He denies that he has caused the complainants any loss or damage or injury whatsoever, or that the complainants have been deprived of any gains or profits which they might or otherwise would have obtained and been in the receipt and enjoyment of had it not been for his acts and doings.

IX.

He admits that the complainants filed a bill of complaint in the circuit court of the United States for the district of Massachusetts against John Hodgkins and H. W. Beal, doing business as Hodg-
kins & Beal, for alleged infringement of the said letters patent,
33 and each of them; that said defendant appeared and filed answer thereto; that issue was joined and proofs taken in said cause on behalf of complainants, but he is informed and believes that no proofs were taken by or on behalf of the defendant, nor was any

defense whatsoever interposed by him or on his behalf, and that the decree entered by the court in said suit was by reason of default on the part of the said defendant.

X.

He charges, on information and belief, that the said letters patent No. 10388, for "design for lace purling," are void, for that the said "design for lace purling" therein shown, described, and claimed was not new and original with the said Abraham G. Jennings, but that the same was, prior to the date of the said alleged inven-
34 tion and production thereof by the said Jennings, known to and used by the following-named persons at the following-named places, viz:

Henry Colton, of Philadelphia, Pennsylvania, at the factory of Messrs. Slocum, in the city of New York, and elsewhere.

Henry Boot, deceased, late of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia, and elsewhere.

Thomas Dolan, in the said city of Philadelphia, and elsewhere.

Henry A. Truitt, of Philadelphia, Pennsylvania, at the city of Philadelphia, and elsewhere.

Cornelius Jackson, of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia.

William McDevitt, of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia.

Henry R. Kibbe, of Somers, Tolland county, in the State of
35 Connecticut, at the city of Philadelphia, and elsewhere.

Dunnington, of Boston, Massachusetts, at the city of Brooklyn, New York, and elsewhere.

Henry Crine, of Boston, at said Boston, Brooklyn, New York, New York city, and elsewhere.

XI.

He charges, on information and belief, that the said letters patent No. 10388 are void, for that the "design for lace purling" shown, described, and claimed therein *were* not original with the said A. G. Jennings, nor did he invent and produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of —— Dunnington, now of Boston, Massachusetts, then of Brooklyn, New York, who, after inventing and producing the said designs for lace
36 purling, exhibited and explained the same to the said A. G. Jennings, who thereupon surreptitiously and unjustly obtained the said letters patent No. 10388 for that which had, prior thereto, been invented and produced by the industry, genius, efforts, and expense of the said —— Dunnington.

XII.

He charges, on information and belief, that the said letters patent No. 10388 are void, for that the "design for lace purling" shown, described, and claimed therein was not original with the said A. G.

Jennings, nor did he invent and produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of Henry Boot, deceased, late of Philadelphia, Pennsylvania, then of
37 Brooklyn, New York, who, after inventing and producing the said "design for lace purling," exhibited and explained the same to the said A. G. Jennings, who thereupon surreptitiously and unjustly obtained the said letters patent No. 10388 for that which had, prior thereto, been invented and produced by the industry, genius, efforts, and expense of the said Boot.

XIII.

He charges, on information and belief, that the said letters patent No. 10388 are void, for that the "design for lace purling" shown, described, and claimed therein was not original with the said A. G. Jennings, nor did he invent and produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of Henry Crine, of Boston, at said Boston, Brooklyn, New York, New
38 York city, and elsewhere, who, after inventing and producing the said "design for lace purling," exhibited and explained the same to the said A. G. Jennings, who thereupon surreptitiously and unjustly obtained the said letters patent No. 10388 for that which had prior thereto been invented and produced by the industry, genius, efforts, and expense of the said Crine.

XIV.

He charges, on information and belief, that the said letters patent No. 10448 for "design for a fringed lace fabric" are void, for that the said design therein shown, described, and claimed was not new and original with the said Warren P. Jennings, but that the same was, prior to the date of the said alleged invention and production thereof by the said Jennings, known to and used by the following-named persons at the following-named places, viz:

39 Henry Colton, of Philadelphia, Pennsylvania, at the factory of Messrs. Slocum, in the city of New York, and elsewhere.

Henry Boot, deceased, late of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia, and elsewhere.

Thomas Dolan, of the city of Philadelphia, at said city, and elsewhere.

Henry A. Truitt, of Philadelphia, Pennsylvania, at said city, and elsewhere.

Cornelius Jackson, of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia.

William McDevitt, of Philadelphia, Pennsylvania, at the factory of Thomas Dolan, in said city of Philadelphia.

Henry R. Kibbe, of Somers, Tolland county, State of Pennsylvania, at the city of Philadelphia, and elsewhere.

Dunnington, of Boston, Massachusetts, at the city of Brooklyn, New York, and elsewhere.

Henry Crine, of Boston, at said Boston, Brooklyn, New York, New York city, and elsewhere.

XV.

He charges, on information and belief, that the said letters patent No. 10448 are void, for that the "design for a fringed lace fabric" shown, described, and claimed therein was not original with the said Warren P. Jennings, nor did he invent or produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of —— Dunnington, now of Boston, Massachusetts, then of Brooklyn, New York, who, after inventing and producing the said designs for a fringed lace fabric, exhibited and explained the same to the said Warren P. Jennings, who thereupon surreptitiously and unjustly obtained the said letters patent No. 10448 for that which had prior thereto been invented and produced by the industry, genius, efforts, and expense of the said Dunnington.

XVI.

He charges, on information and belief, that the said letters patent No. 10488 are void, for that the "design for a fringed lace fabric" shown, described, and claimed therein was not original with the said Warren P. Jennings, nor did he invent and produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of Henry Boot, deceased, late of Philadelphia, Pennsylvania, then of Brooklyn, New York, who, after inventing and producing the said "design for a fringed lace fabric," exhibited and explained the same to the said Warren P. Jennings, who thereupon surreptitiously and unjustly obtained the said letters patent No. 10448 for that which had prior thereto been invented and produced by the industry, genius, efforts, and expense of the said Boot.

XVII.

He charges, on information and belief, that the said letters patent No. 10448 are void, for that the "design for a fringed lace fabric" shown, described, and claimed therein was not original with the said Warren P. Jennings, nor did he invent and produce the same by his own industry, genius, efforts, and expense, but that the same was invented and produced by the industry, genius, efforts, and expense of Henry Crine, of Boston, Massachusetts, who, after inventing and producing the said "design for a fringed lace fabric," exhibited and explained the same to the said Warren P. Jennings, who thereupon sureptitiously and unjustly obtained the said letters patent No. 10448 for that which had prior thereto been invented and produced by the industry, genius, efforts, and expense of the said Crine.

XVIII.

He admits that he, or the firm of Thomas Dolan & Co., of which he is senior member, is now, and has been for some time past, largely engaged in manufacturing a fabric consisting of pillars provided with regular laterally projecting loops—that is, having loops projecting to an equal distance on each side of the pillars thereof, but denies that such fabric infringes the said Jennings patent No. 10388.

He is advised and believes that if the said Jennings patent
44 No. 10388, which is for a fabric the pillars whereof are provided with irregular laterally projecting loops, is construed to cover a fabric the pillars whereof are provided with regular laterally projecting loops, which is the fabric he or the firm of Thomas Dolan & Co. are now manufacturing, then said patent is anticipated by the fabric made by me, or the firm of Thomas Dolan & Co., of which I am senior member, long prior to the date of the said Jennings patent, and therefore is void.

He admits that the complainants filed their bill of complaint in the United States circuit court, southern district of New York, against Henry R. Kibbe *et al.* for infringement of the said design letters patent No. 10388 and No. 10448, herein referred to, and
45 that after argument a preliminary injunction was granted by the court and issued against the defendant, as alleged in the bill of complaint, enjoining him from continuing to sell a fabric the pillars whereof are provided with irregular laterally projecting loops; and he further admits that said suit has been and is now being defended by him, or the firm of Thomas Dolan & Co., of which he is senior member, and that the defendant therein is acting as agent for the sale of goods alleged to be infringed by him, or the firm of which he is senior member, and that the goods alleged to be an infringement and enjoined by the court were made by his firm.

XIX.

He is advised and believes that the said several letters patent No. 10388, for "design for lace purling," and No. 10448, for
46 "design for a fringed lace fabric," and each of them, *is* void for want of novelty.

XX

He submits that the complainants are not entitled to the relief, sought for in said bill of complaint, and, without admitting any matters therein charged and not sufficiently herein answered unto *are* true, pray- to be hence dismissed, with his costs.

THOMAS DOLAND.

GEORGE HARDING,
JOHN R. BENNETT,
Sol'rs and of Counsel for Defendant.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

PENNSYLVANIA:

Thomas Doland, the above-named defendant, being duly sworn, deposes and says as follows: That the foregoing answer by him subscribed is true, so far as the statements therein contained are within his own knowledge, and so far as made on information and belief he verily believes them to be true.

47

Subscribed and sworn to before me this 20th day of July, A. D. 1881.

[L. S.] GEO. H. MERCER,
Notary Public.

Endorsed: U. S. C. court, so. dist. of N. Y'k. In equity. Jennings *et al. vs.* Dolan. Answer. U. S. circuit court. Filed Jul- 21, 1881. Joseph M. Deuel, clerk.

48 Circuit Court of the United States for the Southern District of New York. In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN.

The replication of Abraham G. Jennings and Warren P. Jennings, complainants, to the answer of Thomas Dolan, defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be to be replied unto by these repliants:

49 Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

BRIESEN & BETTS,
Solicitors for Complainants.

Endorsed: United States circuit court, southern district of New York. In equity. Abraham G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Replication. Briesen & Betts, solicitors for complainants, No. 229 Broadway, New York, N. Y. U. S. circuit court. Filed Aug. 1, 1881. Joseph M. Deuel, clerk.

50 United States Circuit Court, Southern District of New York.
In Equity.

ABRAHAM G. JENNINGS & WARREN P. JENNINGS
vs.
THOMAS DOLAN.

NEW YORK, *Sept.* 9, 1881.

Testimony taken on the part of the complainants, under and pursuant to the 67th rule of the Supreme Court of the United States as amended, before John A. Shields, Esq., a standing examiner of said court.

Present: Briesen & Betts, Esqrs., counsel for comp'ts, Mr. W. G. Button representing John R. Bennett, Esq., for defendant.

(At request of John R. Bennett, Esq., of counsel for defendant, the taking of testimony in above case is adjourned to 11 o'clock
51 a. m., September 10, at office of Briesen & Betts, 229 Broadway, N. Y.

NEW YORK, *September 10th*, 1881.

Present: A. V. Briesen, Esqr., of counsel for comp't, and John R. Bennett, Esq., of counsel for def't.

Counsel for complainant offers in evidence lettters patent No. 10388, granted to Abraham G. Jennings January 1st, 1878, for design for lace purling, and the same is marked "Comp'ts' Exhibit Fabric Patent. J. A. S., Ex'r. Sept. 10th, 1881."

Also letters patent No. 10448, granted to Warren P. Jennings Feb'y 12th, 1878, for design for fringed lace fabric, and the same is marked "Comp'ts' Exhibit Fringed Patent. J. A. S., Ex'r. Sept. 10th, 1881."

52 Also assignment from A. G. Jennings to himself and W. P. Jennings, bearing date Feb'y 20, 1878, with certificate of record thereon, and the same is marked "Comp'ts' Exhibit No. 1. J. A. S., Ex'r. Sept. 10, 1881."

Also assignment from W. P. Jennings to himself and A. G. Jennings, bearing date Feb'y 20th, 1878, with certificate of record thereon, and the same is marked "Comp'ts' Exhibit No. 2. J. A. S., Ex'r. Sept. 10, 1881."

Counsel for complainants asks whether counsel for defendant will or will not waive proof of execution of the assignments.

Counsel for defendant waives proof of execution of the assignments just offered in evidence.

53 Counsel for complainants also offers in evidence a nubia, and the same is marked "Complainants' Exhibit Kibbe Nubia—J. A. S., Ex'r—Sept. 10, 1881," being the same nubia offered in evidence in case Jennings *vs.* Kibbe, and asks counsel for defendant to admit that said nubia is one made and sold by the defendant prior to the commencement of this suit and subsequent to the issue of Exhibits Fabric Patent and Fringe Patent.

Counsel for defendant admits the manufacture and sale by the defendant of the nubia "Complainants' Exhibit Kibbe Nubia—J. A. S., Ex'r—Sept. 10, 1881," prior to the commencement of this suit, and subsequent to the issue of the Jennings patents mentioned in the bill of complaint.

JOHN R. BENNETT,
Def't- Sol'r.
BRIESEN & BETTS,
Compl'ts' Solicitors.

Comp'ts' *prima facie* case closed.

54 UNITED STATES PATENT OFFICE.

ABRAHAM G. JENNINGS, of Brooklyn New York.

Design for Lace Purling.

Specification forming part of Design No. 10388, dated January 1, 1878; application filed December 17, 1877.

To all whom it may concern:

Be it known that I, Abraham G. Jennings, of Brooklyn, Kings county, New York, have invented a new and original design for lace purling, of which the following is a specification:

Figure 1 represents a photographic illustration of my new lace purling. Fig. 2 is a photographic illustration of the same design made of coarser thread.

This invention relates to a new design for a lace fabric, and it consists in providing the pillars thereof with more or less irregular laterally-projecting loops, thereby imparting to the entire fabric a puckered, wavy, purl-like appearance, which is indicated in the photograph. The loops on the pillars are placed close together to increase the effect.

I claim—

The design for a lace purling the pillars whereof are provided with irregular laterally-projecting loops, substantially as shown.

ABRAHAM G. JENNINGS.

Witnesses:
T. B. MOSHER,
A. V. BRIESEN.

55 Endorsed: A. G. Jennings *et al. vs.* ——. Comp'ts Exh. Fringe Patent. J. A. S., Ex'r. April 28, 1881.

(Here follows diagram marked p. 56.)

DESIGN.

A. G. JENNINGS.

Lace Purling.

No. 10,388. Patented Jan. 1, 1878.

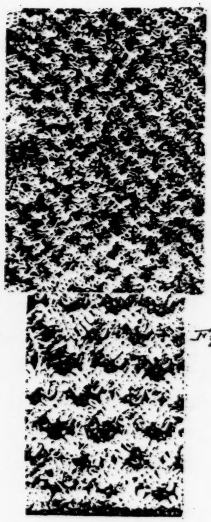


Fig. 1

Fig. 2

No. 153.
Doolan
v.
Jennings
et al.
p. 56.

Witnesses:
John C. Tunbridge.
[illegible]

Inventor:
Abraham G. Jennings
by his attorney
A. G. Dodson

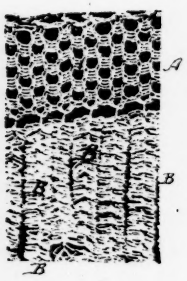
DESIGN.

W. P. JENNINGS.

Fringed Lace Fabric.

No. 10,448. Patented Feb. 12, 1878.

No. 153.
Dolan
v.
Jennings et al.
p. 59



Witnesses:
John C. Tunbridge
D. F. Brosen

Inventor:
Wesson P. Jennings
by his attorney
Alf. Brosen

57 UNITED STATES PATENT OFFICE.

WARREN P. JENNINGS, of Brooklyn, New York.

Design for a Fringed-Lace Fabric.

Specification forming part of Design No. 10448, dated February 12, 1878. Application filed January 9, 1878.

To all whom it may concern:

Be it known that I, Warren P. Jennings, of Brooklyn, Kings county, New York, have invented a new and original design for fringed-lace fabric, of which the following is a specification:

The accompanying photograph illustrates a face view of my new design.

This invention relates to a new looped fringe applied in series to lace fabrics.

A represents the lace fabric of usual kind. B B are the disconnected fringes applied thereto. Each fringe B is formed with loops at both sides of a central stem or rib along its entire extent, as shown, thus producing a peculiar, full, and yet loose effect. The fringes are arranged in series of rows and suspended from the lace fabric.

I claim—

The design for a lace fabric provided with disconnected doubly-looped fringes B, having loops at both sides of a central stem or rib, substantially as shown.

WARREN P. JENNINGS.

Witnesses:
TH. JUNCKE.
A. G. JENNINGS.

58 [Endorsed:] Abraham G. Jennings & Warren P. Jennings *vs.* Thomas Dolan. Comp'ts' Exhibit Fabric Patent. J. A. S., Ex'r. Sept. 10, 1881.

(Here follows diagram marked p. 59.)

60 Whereas I, Abraham G. Jennings, of Brooklyn, in the county of Kings and State of New York, did obtain letters patent of the United States of America for a certain new and original design for lace purling (for the term of 14 years), which letters patent bear date the first day of January, eighteen hundred and seventy-eight, and are numbered 10388;

And whereas Abraham G. Jennings and Warren P. Jennings, both of Brooklyn, in the county of Kings and State of New York, are desirous of acquiring all my right, title, and interest in and to said invention:

Now this indenture witnesseth that for and in consideration of the sum of one dollar to me, the said Abraham G. Jennings, in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold, and set over, and do hereby assign, sell, and set over,

61 unto the said Abraham G. Jennings and Warren P. Jennings all the right, title, and interest which I have in the

said invention as secured to me by said letters patent; the same to be held and enjoyed by the said Abraham G. Jennings and Warren P. Jennings for their own use and behoof and for the use and behoof of their legal representatives to the full end of the term for which said letters patent are granted as fully and entirely as the same would have been held and enjoyed by me if this assignment and sale had not been made.

In testimony whereof I hereunto set my hand and affix my seal this 20th day of February, eighteen hundred and seventy-eight.

A. G. JENNINGS. [L. S.]

Sealed and delivered in the presence of—
THOS. STRINGER.

62 (Endorsed:) A. G. Jennings' design patent No. 10388 to himself and W. P. Jennings. Assignment of patent. U. S. Patent Office. Received for record Sept. 29, 1879. Recorded liber L 24, page 411. Ex'd: C. E. L. Record & return to A. V. Briesen, patent and law office, 229 Broadway, New York. A. V. Briesen, patent agency, 229 Broadway, N. Y. Oct. 16, 1879. A. G. Jennings *et al. vs.* H. R. Kibbe *et al.* Compl'ts' Exh. No. 1. J. A. 63 S., Ex'r. April 28, 1881. A. G. Jennings *et al. vs.* Thomas Dolan. Compl'ts' Exhibit No. 1. J. A. S., Ex'r. Sept. 10, 1881.

64 Whereas I, Warren P. Jennings, of Brooklyn, in the county of Kings and State of New York, did obtain letters patent of the United States of America for a certain new and original design for a fringed lace fabric (term of patent, 7 years) which letters patent bear date the twelfth day of February, eighteen hundred and seventy-eight, and are numbered 10448;

And whereas Warren P. Jennings and Abraham G. Jennings, both of Brooklyn, in the county of Kings and State of New York, are desirous of acquiring all my right, title, and interest in and to said invention:

Now, this indenture witnesseth that for and in consideration of the sum of one dollar to me, the said Warren P. Jennings, in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Warren P. Jennings and Abraham G. Jennings all the 65 right, title, and interest which I have in the said invention as secured to me by said letters patent, the same to be held and enjoyed by the said Warren P. Jennings and Abraham G. Jennings for their own use and behoof and for the use and behoof of their legal representatives to the full end of the term for which said letters patent are granted as fully and entirely as the same would have been held and enjoyed by me if this assignment and sale had not been made.

In testimony whereof I hereunto set my hand and affix my seal this 20th day of February, eighteen hundred and seventy-eight.

WARREN P. JENNINGS. [L. S.]

Sealed and delivered in presence of—
THOS. STRINGER.

70 U. S. Circuit Court, Southern District of New York. In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN. } Docket No. 1996.

We hereby consent that Briesen & Steele be substituted as the solicitors for the complainants in the above-entitled case in our place and stead.

New York, 14th Feb'y, 1883.

BRIESEN & BETTS,
Comp'ts' Solicitors.

Endorsed: U. S. circuit court, south. dist. of N. Y. Docket No. 1996. A. G. Jennings *et al. vs.* Thomas Dolan. Consent and order of substitution. Briesen & Betts, comp'ts' sol't'rs, 229 B'way, N. Y. U. S. circuit court. Filed Feb'y 15, 1883. Joseph M. Deuel, clerk.

71 United States Circuit Court, Southern District of New York.

ABRAHAM G. JENNINGS & *al. vs.* THOMAS DOLAN.

Take notice that we shall present the annexed decree, a copy of which is herewith served upon you, to the Hon. William J. Wallace, circuit judge, at the United States circuit court room in the city of New York, on Thursday, October 19th, at the opening of court on that day, for settlement and signature by the judge.

Yours, truly, BRIESEN & BETTS,
Complainants' Solicitors.

New York, Oct. 18, 1882.

To John R. Bennett, Esqr., defendant's solicitor.

72 At a stated term of the United States circuit court held in and for the southern district of New York, at the circuit court rooms in New York city, on the 17th day of October, 1882.

Present: Hon. William J. Wallace, circuit judge.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN. } In Equity. Docket No. 1996.

This cause having come on for final hearing at this October term of the circuit court upon the bill of complaint, the answer of defendant, and the filed papers and exhibits, and the testimony taken on the part of the complainants therein, now, after hearing A. V. Briesen, Esq., of counsel for complainants, and John R. Bennett, Esq., of counsel for defendant, and due deliberation had, 73 and on motion of Briesen & Betts, complainants' solicitors, it is hereby—

Ordered, adjudged, and decreed that the design letters patent of the United States issued to Abraham G. Jennings on the 1st day of January, 1878, as No. 10388, for a new and

Endorsed: W. P. Jennings' design patent No. 10448 to
66 himself and A. G. Jennings. Assignment of patent. U. S. Patent Office. Received for record Sept. 29, 1879. Recorded liber L 24, page 412. Record & return to A. V. Briesen, patent and law office, 229 Broadway, New York. A. V. Briesen, patent agency, Oct. 16, 1879, 229 Broadway, N. Y. Ex'd: C. E. L. A. G. Jennings *et al. vs.* H. R. Kibbe *et al.* Comp'ts' Exh. No. 2. J. A. S., Ex'r. April 28, 1881. A. G. Jennings *et al. vs.* Thomas Dolan. Comp'ts' Exhibit No. 2. J. A. S., Ex'r. Sept. 10, 1881.

67 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the seventeenth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable William J. Wallace, circuit judge.

ABRAHAM G. JENNINGS *et al.*
vs.
THOMAS DOLAN. } (No. 58. Equity Cal.)

The above cause coming on this day for final hearing upon pleadings and proofs, Mr. Arthur V. Briesen is heard in behalf of the complainants. Mr. John R. Bennett is heard in behalf of the defendant.

Decree for complainant. (See same to be entered.)

68 United States Circuit Court, Southern District of New York.
In Equity.

A. G. JENNINGS *et al. vs.* THOMAS DOLAN.

I hereby consent that Messrs. Briesen and Betts be substituted as solicitors for the complainants in the above-entitled case.

A. V. BRIESEN,
Sol'r for Comp'ts.

Ordered accordingly.

SAM'L BLATCHFORD.

Please take notice that we appear as solicitors for the complainants in the above-entitled case.

New York, May 21st, 1881.

BRIESEN & BETTS.

To J. M. Deuel, Esqr., cl'k U. S. C. C., S. D. of N. Y., and ——
——, sol'r for —— ——.

69 Endorsed: U. S. circuit court, S. dist. of New York. A. G. Jennings *et al. vs.* Thomas Dolan. Notice of substitution. Briesen & Betts, sol'rs for compl'ts, 229 Broadway, New York. U. S. circuit court. Filed May 26, 1881. Joseph M. Deuel, clerk.

original design for lace purling, and the design letters patent of the United States issued to Warren P. Jennings on the 12th day of February, 1878, as No. 10448, for a new and original design for fringed lace fabric, are good and valid in law; that the complainants herein are entitled to the exclusive rights in, to, and under said two design letters patent and in and to the inventions and designs secured thereby; that the defendant, Thomas Dolan, has infringed upon the claims of said two design letters patent and upon the exclusive rights of the complainants thereunder.

And it is further ordered, adjudged, and decreed that the
74 complainants do recover from the defendant, Thomas Dolan, the profits, gains, and advantages which the said defendant has derived, received, or made by reason of the infringement of the complainants' exclusive rights under said two design letters patent by any manufacture, use, or sale of lace fabrics containing said inventions and designs, or either of them, and that the said complainants do also recover any and all damages they have sustained by reason of any infringement of their exclusive rights under said two design letters patent, or either of them, by the said defendant; and it is hereby, on consent of counsel for the respective parties, referred to Joseph M. Deuel, Esquire, one of the masters of this court, to ascertain, take, and report the quantity of lace fabrics made and the quantity sold by said defendant, Thomas Dolan, in violation of said two design letters patent, or either of them, and the
75 quantity of such lace fabrics which said defendant has on hand, and the gains, profits, and advantages derived by said defendant from and through said infringements, and to assess the damages suffered by the complainants by reason of said infringements, and to report thereon with all convenient speed.

And the defendant, Thomas Dolan, is hereby directed and required to attend before said master from time to time, as required, and to produce before him such books, papers, exhibits, statements, vouchers, and documents as he may be directed by said master to produce, and to submit to such oral or other examination as the master may direct.

And it is further ordered, adjudged, and decreed that a perpetual injunction be issued out of and under the seal of this court
76 enjoining and restraining the defendant, Thomas Dolan, and his servants, agents, attorneys, representatives, and workmen from directly or indirectly making, or causing to be made, constructing, or causing to be constructed, using, or causing to be used, vending, or causing to be sold, delivering, or causing to be delivered, working, or causing to be worked, or putting into practice, operation, [or use,] or in anywise counterfeiting or using or imitating the said inventions and designs, or either of them, or any part or parts thereof, or any lace fabrics made in accordance therewith, or like or similar to those which the said defendant, Thomas Dolan, has heretofore made, used, or sold, containing or embodying the inventions or designs described and claimed in said two design letters patent, Nos. 10388 and No. 10448, or either of them, in any way whatsoever.

77 And it is further ordered, adjudged, and decreed that the complainants do recover of the defendant, Thomas Dolan, the costs of this suit, to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the master's report.

WM. J. WALLACE.

Consented that Joseph M. Deuel be appointed as master.
10, 19, '82.

JNO. R. BENNETT,
Pro. Def'ts.
BRIESEN & BETTS,
Comp'ts' Sol'rs.

Endorsed: U. S. circuit court, south. dist. of N. Y. A. G. Jennings *et al. vs.* Thomas Dolan. Interlocutory decree. Briesen & Betts, sol'rs for comp'ts, 229 Broadway, New York. Service of a copy of the within decree & notice is hereby admitted Oct. 18, '82. John R. Bennett, counsel for def'ts. U. S. circuit court Filed Oct. 19, 1882. Joseph M. Deuel, clerk.

78 U. S. Circuit Court, So. Dist. of New York. In Equity.

A. G. JENNINGS *et al. vs.* THOMAS DOLAN.

I have attended to the duties assigned to me by the decree made and entered herein on the 19th day of October, A. D. 1882, in the discharge of which I have been attended by Mr. A. V. Briesen, of counsel for complainants, and by Mr. John R. Bennett, of counsel for defendant.

I find and report from the evidence taken before me that the defendants manufactured and disposed of four thousand two hundred ninety-five and $\frac{9}{12}$ dozen ($4{,}295\frac{9}{12}$) pearl lace nubias, which infringed complainants' patent.

79 I further find and report that of the number so found as above twenty-two hundred and eighty-one & $\frac{5}{12}$ dozen ($2{,}281\frac{5}{12}$), were consigned to and sold by Kibbee, Chaffee, Shreve & Co., of New York city, against whom, and in a suit in this court entitled A. G. Jennings *et al. vs.* Henry R. Kibbe *et al.*, complainants have obtained a decree for eleven hundred fifty-four dollars and sixty-two cents, such damage having been measured by the complainants' license fee of fifty cents per dozen.

I further find and report that by stipulation of counsel damages are to be assessed in this case for the whole amount of nubias manufactured and sold by the defendant, and a decree entered therefor, and that if, at any time prior to the satisfaction of said decree, the decree against Kibbee *et al.* is paid or satisfied, in whole or in part,

80 as to such damages, the amount so paid shall be considered as credited upon, and be deducted from, the decree in this cause for the corresponding number of nubias covered by such payment.

I further find and report that complainant has an established

license fee of fifty cents per dozen for the nubias made and sold as aforesaid, which must be the measure of damages herein.

I find as conclusion of law that the complainants are entitled to recover fifty cents per dozen upon the amount manufactured and sold as aforesaid, amounting to the sum of two thousand one hundred and fifty-seven dollars and eighty-eight cents, with interest to the date of this report, amounting to one hundred and fifty-six dollars and seven cents, and amounting in the aggregate to the sum of two thousand three hundred and three dollars and ninety-five cents.

81 All of which is respectfully submitted.

J. M. DEUEL, *Master.*

Dated New York, Jan'y 19th, 1883.

Endorsed: U. S. circuit court, so. dist. of N. Y. A. G. Jennings *et al. vs.* Thomas Dolan. Master's report. U. S. circuit court. Filed Jan. 22, 1883. Joseph M. Deuel, clerk.

Affidavit of Service.

U. S. Circuit Court, So. Dist. of New. York.

A. G. JENNINGS and WARREN P. JENNINGS
against
THOMAS DOLAN.

STATE & COUNTY OF NEW YORK:

August Schlarbaum, being duly sworn, says that he is of
82 the age of fifteen years and upwards; that on the 14th day of April, 1883, between the hours of 2 p. m. and 3 p. m., at 237 Broadway, New York city, he served John R. Bennett, sol'r for the defendant herein, with the annexed final decree and notice by showing the same and by leaving copies of the same with a clerk in charge of said Bennett's office.

AUGUST SCHLARBAUM.

Sworn before me this fourteenth day of April, 1883.
[L. S.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed [in] N. Y. Co.

United States Circuit Court, Southern District of New York.
In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN. } Docket No. 1996.

Take notice that on Tuesday, the 17th day of April, 1883
83 at the opening of the court on that day, or as soon thereafter as counsel can be heard, we shall present the final decree, a copy of which is herewith served upon you, to his honor Judge

Wallace, at the court-room of this court, in the post-office building, New York city, for settlement.

Yours, &c., BRIESEN & STEELE,
Comp'ts' Solicitors.

New York, 14 April, 1883.

To George Harding, Esqr., and John R. Bennett, Esq., def't's sol'rs.

At a stated term of the circuit court of the United States held in and for the second circuit and southern district of New York, at the circuit court room in the city of New York, on the 17th day of April, 1883.

84 Present: Hon. William J. Wallace, circuit judge.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN.
} In Equity. Docket No. 1996.

The master's report made in pursuance of the interlocutory decree in this case having been duly filed on the 22d day of January, 1883, which said report finds in favor of complainants the sum of $2,147.88 as recoverable damages and $156.07 as interest thereon to the 19th day of January, 1883, the date of said report, and no exceptions thereto having been filed by either party, and the time for excepting having expired, and a rule having been entered confirming said report:

Now, therefore, upon consideration thereof, and on motion
85 of Briesen & Steele, complainants' solicitors, it is—

Ordered, adjudged, and decreed that the said master's report be, and the same hereby is, in all things confirmed, and that the complainants, Abraham G. Jennings and Warren P. Jennings do recover from the defendant, Thomas Dolan, the sum of $2,303.95, together with $33.80 interest thereon from the 19th day of January, 1883, and with the costs and disbursements in this cause as adjusted by the clerk of this court, amounting to the sum of $85.75, amounting in all to the sum of $2,423.50, and that said defendant pay said sum to the complainants, and that the complainants have execution and proper process of law for the collection thereof.

WM. J. WALLACE.

86 Endorsed: U. S. circuit court, so. dist. of New York. A. G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Final decree and notice. Briesen & Steele, sol'rs for comp'ts, 229 Broadway, New York. Due service of copy of within notice and proposed final decree admitted this 14 day of April, 1883. ——, sol'r for def't. U. S. circuit court. Filed April 17, 1883. Timothy Griffith, clerk.

87 United States Circuit Court, Southern District of New York.
In Equity.

ABRAHAM G. JENNINGS *vs.* THOMAS DOLAN.

It is hereby stipulated that the foregoing papers shall constitute the record to be sent by the clerk of this court to the clerk of the Supreme Court of the United States on the appeal taken to said Supreme Court in the above-entitled suit, and that all the exhibits in the cause may be retained by the clerk of this court until the hearing on appeal in said Supreme Court, except the exhibits offered in evidence before the master, which shall be withheld and considered as forming no part of the record on appeal.

88 (S'g'd) JOHN R. BENNETT,
Counsel for Def't.
(S'g'd) BRIESEN & STEELE,
Compl'ts' Sol'rs.

New York, Sept'r 26, 1883.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Jennings *vs.* Dolan. Stipulation as to record, etc. U. S. circuit court. Filed Sep. 26, 1883. Timothy Griffith, clerk.

89 United States Circuit Court, Southern District of N. Y., Second Circuit. In Equity.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN.

To the honorable the Supreme Court of the United States:

The appeal of the above-named defendant and appellant respectfully shows:

That the above-named complainants and appellees filed their bill of complaint in the circuit court of the United States for the southern district of New York against the above-named defendant and appellant, reciting the grant and issue of the two design letters patent of the United States, No. 10388, to Abraham G. Jennings, January 1, 1878, for a new and original design for "lace purling," and No. 10448, to Warren P. Jennings, February 12, 1878, for a new and original design for "lace fabric," and charging that the said
90 defendant and appellant has infringed each of said two design letters patent, and praying for a decree, an injunction, and account.

That this defendant and appellant appeared and filed answer denying the allegations of the said bill of complaint and that he infringed either of said two design letters patent, or intended so to do.

That thereafter this cause was heard on the pleadings and proofs taken therein by his honor William J. Wallace, circuit judge, who afterwards, and on or about the 19th day of October, A. D. 1882, filed an opinion sustaining the validity of each of the said design letters patent, and finding that said defendant and appellant had

infringed each of said design letters patent, and ordering an interlocutory decree to be entered in favor of complainants and apellees, as prayed for.

That in accordance therewith an interlocutory decree was
91 entered ordering an injunction to issue restraining said defendant and appellant from further infringing said two design letters patent, and referring this cause to a master to take an account of the gains, profits, and advantages derived by the said defendant and appellant from and through said infringements, and to assess the damages suffered by complainants by reason of said infringement, and that complainants and appellees recover their costs in this suit, to be taxed.

That the master to whom this cause was so referred having taken proofs and heard the parties on the matters referred to, made his report thereon, to which no exceptions were filed by the said defendant and appellant, and on the 17th day of April, A. D. 1883, a final decree was entered in this cause confirming the report of the master, and wherein it was ordered that the complainants and a-pellees therein do recover from the said defendant and appellant
92 the sum of two thousand four hundred and twenty-three dollars and fifty cents ($2,423.50), and that the said complainants and appellees have due execution and proper process for the collection thereof.

Wherefore this appellant appeals from the whole of the said decree of the said circuit court of the United States and respectfully prays that the decree of the said circuit court of the United States and the pleadings, proofs, exhibits, and proceedings in said cause may be forthwith sent to the Supreme Court of the United States, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court and every part thereof may be reversed and a decree made dismissing said bill of complaint with costs, or such other decree as to the said Supreme Court shall seem just.

JOHN R. BENNETT,
Attorney for Appellant.

93 The appeal is allowed as prayed for; citation to issue, bond having been approved.

WM. J. WALLACE,
Circuit Judge.

Service of within petition admitted this 9th day of May, 1883.
BRIESEN & STEELE,
Solicitors for Complainants.

Endorsed: No. 1996. U. S. C. C't, S. D. N. Y. In equity. Abraham G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Petition. U. S. circuit court. Filed May 9, 1883. Timothy Griffith, clerk.

94 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS
vs.
THOMAS DOLAN. } No. 1996.

Know all men by these presents that we, Thomas Dolan, of the city of Philadelphia, State of Pennsylvania, and Walter H. Lewis, of the city of New York, State of N. Y., are held and firmly bound unto the above-named Abraham G. Jennings and Warren P. Jennings in the sum of ten thousand dollars, to be paid to the said Abraham G. Jennings and Warren P. Jennings; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eight day of May, in the year of our Lord one thousand eight hundred and eighty-three (1883).

Whereas the above-named Thomas Dolan has prosecuted an appeal to the Supreme Court of the United States to reverse the decision and decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Dolan shall prosecute the said appeal to effect and answer all damages and costs, if any, or if said Thomas Dolan shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THOMAS NOLAN.
WALTER H. LEWIS.

Sealed and delivered and taken and acknowledged this 8th day of May, 1883, before me—

[L. S.] GEORGE H. SONNEBORN,
Notary Public, N. Y. County.

95 [Endorsed:] No. 1996. U. S. circuit court. Abraham G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Bond for damages and costs *on.* Approved May 8, 1883. Wm. J. Wallace. U. S. circuit court. Filed May 8, 1883. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Walter H. Lewis, being duly sworn, deposes and says he is a resident of the State of New York; that he is worth the sum of ten thousand dollars in real estate over and above all his just debts and liabilities situate in the State of New York.

WALTER H. LEWIS.

Sworn to this 8th day of May, A. D. 1883, before me—
GEO. H. SONNEBORN,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Thomas Dolan, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

THOMAS DOLAN.

Subscribed and sworn to before me this 8th day of May, A. D. 1883.
[L. S.] GEO. H. SONNEBORN,
Notary Public, N. Y. County.

96 By the Honorable William J. Wallace, judge of the circuit court of the United States in and for the second circuit and southern district of New York.

To Abraham G. Jennings and Warren P. Jennings:

Whereas Thomas Dolan has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the second circuit and southern district of New York in favor of you, the said Abraham G. Jennings and Warren P. Jennings, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court of the United States at the city of Washington, D. C., on the second Monday of October, A. D. 1883, to do and receive what may appertain to justice to bedone in the premises.

97 Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of May, anno Domini one thousand eight hundred and eighty-three.

WM. J. WALLACE.
Circuit Judge.

Service of within citation admitted this 9th day of May, 1883.
BRIESEN & STEELE,
Solictors for Complainants.

Endorsed: No. 1996. U. S. C. Ct., S. D. N. Y. In equity. Abraham G. Jennings and Warren P. Jennings *vs.* Thomas Dolan. Citation. U. S. circuit court. Filed May 9, 1883. Timothy Griffith, clerk.

98 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to ninety-seven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Abraham G. Jennings and Warren P. Jennings against Thomas Dolan as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the said United States the one hundred and eighth.

[Seal of U. S. Circuit Court.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 153. Thomas Dolan, appellant, *vs.* Abraham G. Jennings and Warren P. Jennings. Filed 12th October, 1883.

122-640

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

Nos. 152 and 153.

HENRY R. KIBBE et al.,
Appellants,
vs.
A. G. and W. P. JENNINGS.

No. 152.

THOMAS DOLAN,
Appellant,
vs.
A. G. and W. P. JENNINGS.

No. 153.

BRIEF ON BEHALF OF THE APPELLANTS.

JOHN R. BENNETT,
Attorney for Appellants.

BURGOYNE'S "Quick" Print, Cor. Walker and Centre Sts., N Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

Nos. 152 and 153.

HENRY R. KIBBE ET ALS.,
Appellants,

vs.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS.

THOMAS DOLAN,
Appellant,

vs.

ABRAHAM G. JENNINGS and WARREN P. JENNINGS.

BRIEF ON BEHALF OF THE APPELLANTS.

These are two cases brought against the respective appellants by the appellees for infringement of two design patents No 10,388 and 10,448, for designs for lace fabrics.

The questions involved refer, first, to the merits of the cases, and, second, to the Master's report.

As to the merits the only question involved is that of infringement. The Court found, as appears by the opinion printed, pages 17 to 19 of number 152, on comparison of the defendants' nubia with the complainants' patent that both patents were infringed, and a decree was ordered.

No witnesses were examined on either side in either of the cases before the hearing. The evidence was confined to an introduction of the patents, two assignments and a nubia, which it was admitted was sold by the defendants. Thomas Dolan, the defendant in No. 153, was the dealer and manufacturer, and the defendants Kibbe, Chaffee, Shreve & Co., in No. 152, were the consignee, so to speak, of Dolan. Although decrees were entered in both cases covering the same nubias, it was stipulated that if damages should be collected in the case against Kibbe, the amount of such judgment should be credited in the Dolan case.

See Dolan Record, p. 22, fols. 79 and 80.

ASSIGNMENT OF ERRORS.

The learned Judge who presided in these causes in the Court below erred :

FIRST. In passing upon the question of infringement of the design patents in suit in the absence of any evidence offered or tending to show infringement.

SECOND. In overlooking or neglecting the fact that the design patents in these cases are of a peculiar character, depending upon method of construction rather than appearance, and, therefore, are absolutely dependent upon testimony of identity to make out a case of infringement.

THIRD. In failing to decide that there was no resemblance to the eye between the actual nubia of defendants and the photolithographic drawings of complainants, the only things before the Court.

FOURTH. In overlooking or neglecting to apply the rule of chancery that an answer is evidence, so far as responsive to the bill, of such character that it can only be overcome by the evidence of more than one witness or of one witness and confirmatory circumstances.

FIFTH. In finding that design Patent No. 10,388 was infringed by defendants' nubia, inasmuch as the patent is for "*irregular*" loops, and the loops of defendants' nubia are "*regular*."

SIXTH. In not finding that design Patent No. 10,448 was void for want of novelty, and hence the defendants could not be liable even if they infringed.

ARGUMENT.

1. The first and chief error into which the learned Judge has fallen, is that in the absence of any testimony identifying the nubia of defendant with the design covered by the patents in suit, he should have taken upon himself to decide that there was an infringement. It is undoubtedly the province of the Court to decide in cases of patents for inventions, whether the defendants' machine or device comes within the terms of the patent, but even in the case of patents for inventions it has been held by a long line of cases, both in the Circuit and in this Court, that expert testimony is useful and proper, and sometimes necessary (using the term expert in the broad sense, to include persons familiar practically with that branch of commerce or of art, as well as scientific and trained men), in order that the Court may not be forced to decide upon its own experience in that particular line, whether the patented invention is novel and useful, or old and well known ; how much of it is new and useful, and whether the same mechanical principle or device is found in the defendants' mechanism, which it was the purpose of the Patent Office to secure to the complainants by the patent.

We do not deny that occasionally cases of patents for inventions may arise wherein the invention is so simple that it might seem a work of supererogation to call an expert ; as, for instance, in the well-known case of Reckendorfer vs. Faber, wherein the alleged invention consisted in combining a lead pencil and a rubber tip, but even in cases as simple as that we submit it would be a dangerous practice for the Court to decide the question of infringement upon the mere production of the patent and of the mechanism made, used or sold by the defendant without a single word of testimony as to resemblance or difference between the two. For obviously in such cases the decision would depend, not upon principles of law or the rules of evidence laid down for the guidance of the Courts by long practice in England and the United States, but merely upon the facilities which the special Judge may have had, not officially, but in his private capacity, of becoming acquainted with what is going on in the trade in that particular line, so that, for instance, a Judge

in some central district, where there was no special navigationable water, might be very much embarrassed to decide the question of infringement on ships' pumps or capstans, while a Judge in Maine or New Hampshire might be equally embarrassed as to grain binders so common in the Western States.

So it has been held in the following cases, that in patent cases, scientific and practical experts are useful, if not absolutely necessary to the Court (Allen vs. Blunt, 3 Story, 742; Allen vs. Hunter, 6 McLean, 303; Barrett vs. Hall, 1 Mason, 447; Crosby vs. Lapouraille, Taney Dec., 374; Conover vs. Rapp, 4 Fisher, 57; Latta vs. Shawk, 1 Bond., 259; Hudson vs. Draper 4 Clifford, 178; Waterbury Brass Company vs. New York & Brooklyn Brass Co., 3 Fisher, 43; Dixon vs. Moyer, 4 Washington, 68; Morris vs. Barrett, 1 Bond., 254; all of which are in Circuit, and Bischoff vs. Wetherad, 9 Wallace, 812. and Seymour vs. Osborne, 11 Wallace, 516, in the Supreme Court, and many others).

But still more urgent is the necessity for some testimony of infringement in the case of a design patent. For a person who has risen to the dignity of a Judge of the Circuit Court may, perhaps, reasonably be expected to be familiar with ordinary mechanical principles and as the question of mechanical infringement does not depend upon outward resemblance, but upon substantial identity of principle, the question of infringement is then one of mixed law and fact, and the facts in comparison with the law are perhaps easy to determine, but a design patent has always been held to be different in this respect. That the question of infringement depends upon resemblance to the eye. It is not, as in the case of a machine, that the defendants' device is constructed in substantially the same way and embodies substantially the same principles as the device covered by the patent, but it is that the ordinary purchaser in the market who was looking for the device of the plaintiff, with which he was familiar should be deceived by the outward resemblance into purchasing the device of the defendant. The question therefore in a suit on a design is not whether the Judge himself, if he went to market to buy the plaintiff's device, would be led into purchasing the defendants' device, but whether the majority, or a reasonably large number of ordinary purchasers of that line of goods would be deceived. And it might well be that the Judge himself might be so misled by the outward resemblance, when nobody else in the community would be, or that the Judge might not be misled when every-

body else would be. The identity of a design patent must be determined, so to say, empirically.

To use a familiar illustration from elementary philosophy, viz. :

A throws a stone and the stone strikes a tree. There is no evidence which deserves to be considered in that fact that the stone was aimed at the tree, even if A is known to be a good marksman, but if eighteen or twenty persons all throw stones and most of them either strike the tree or go very close to it, the presumption is strong enough to dispose of ordinary cases, that by a tacit understanding the different throwers were aiming at the tree, although each of them might individually be a very poor shot. How, therefore, a Judge of the Circuit Court can be allowed to decide from his own eyesight without the slightest proof outside of it that these eighteen or twenty throwers or purchasers who bought the defendants' device were not intending to buy the defendants' device, but were deceived into buying it by its resemblance, when they intended to buy the plaintiff's device either because he himself, on some prior occasion, was so deceived, or because he thinks that he probably would have been so deceived if he had undertaken to make such purchase, is, we submit, more than we can understand.

His Honor, Mr. Justice Blatchford (then the Circuit Judge), in rendering his decision in these cases, recognizes the fact that this resemblance in a design patent should be one that would strike the eye, for he says :

"It held that the true test of identity of design is sameness of appearance ; in other words, sameness of effect upon the eye ; " and it need not be the eye of an expert, but of ordinary observers.

By "it" his Honor referred to the case of Gorham Co. vs. White, 14 Wall., 511, a decision of this Court. Now in that case there was abundant evidence on both sides, and therefore the Court, in deciding the question of infringement, was weighing the evidence of those witnesses, believing some and discrediting others, but that case can afford no precedent for a case like the present, in which there is no evidence outside of the Judge's own eyesight, that there is any resemblance whatever between the defendants' device and the plaintiff's design, much less that anybody would be deceived by such resemblance into purchasing the former for the latter.

In the Gorham case there was a conflict of evidence and the Court had to determine. Here there is no evidence at all, much less a conflict.

His Honor, therefore, entirely overlooked the fact that *his* eyesight and *his* experience might, as above set forth, be entirely different from the eyesight and the experience of an ordinary observer. We, therefore, respectfully submit that the finding of infringement of a design patent when no testimony has been offered by complainant, either expert testimony or some other form of testimony, is an error of an important and radical kind, and that for this reason alone the appeal should be sustained.

2. The second branch of the question of infringement is perhaps of no less importance than the first—namely: The design covered by the patent is not a question of lines, of colors, of shading, pictorial representation, or things of that sort, but is described to be a certain vague appearance which results from the construction of the article, in this case a nubia, and which construction shines through, so to speak, the appearance of the nubia. The claim of one patent is:

"The design for a lace purling the pillars whereof are provided with irregular laterally-projecting loops, substantially as shown."

And in the other patent: "The design for a lace fabric provided with disconnected double-looped fringes B, having loops at both sides of a central stem or rib, substantially as shown." Therefore, unlike the majority of designs, the thing in this pair of patents which speaks to the eye is not color, which is the thing that more than any other, perhaps, attracts the purchaser; nor shape, which is again a prominent means for distinguishing designs; nor outlines, nor the shape of the loops, nor the number of stitches, nor the fineness of the stitches, nor the interlocking of the threads, nor any other of the details which determine ladies in purchasing such garments for themselves (it not being supposed that many men, with the exception of dealers, would buy articles of the character covered by this patent); but the question of resemblance is to be determined according to the patent, first, by the method of construction, and then by the appearance resulting from the construction.

Whether or not a claim for a design, which refers simply to the method of construction, is good is a very serious question, but that it is wholly outside the province of the Judge to decide that the construction of a lady's nubia shining through its outward appearance so speaks to the eye as to deceive the ordinary purchaser, is a ques-

tion which we submit presents no sort of difficulty, and for this reason the appeal should be sustained.

3. A third consideration on this question of infringement is the absence of a nubia or some other article of apparel embodying the plaintiffs' design and coming from the complainants, because the drawings of the patents can in no sense be regarded as resembling the actual nubia produced by defendants, and, therefore, in these particular cases the ordinary resemblance between the article embracing the design, and the design on paper has no place, because as before stated the design is not one of looks, or shape, or anything of that sort, but of method of construction, and the drawings accompanying the patents do not show, even so much as a fashion plate would show, the method of construction of these garments.

Not to recognize this manifest difference of appearance and this total unlikeness was, we submit, an error of such magnitude that on this account alone the appeal should be sustained.

4. We have urged and insisted and we think, convincingly, that there is no warrant for a Judge to decide the question of identity of design in suits on design patents, where there is a total absence of evidence on both sides, but in the cases here another serious error has been made, owing to the fact that coupled with the total absence of testimony on the part of complainants we have an answer under oath, denying in positive terms any infringement, and the oath to the answer is not waived; therefore, under the uniform system of practice in courts of equity and chancery, the answer in this case should be conclusive as to the question of infringement, for it is invariably the case that when the oath to an answer is not waived, and the answer is made under oath, it is, as to matters responsive to the bill, evidence which is conclusive unless rebutted by the testimony of more than one witness on the part of complainant, or one witness and surrounding circumstances sufficient to credit him and discredit the answer.

The language of his Honor Judge SAWYER in Slessinger vs. Buckingham decided in 1883, reported 17 Fed. Rep., 454, is so direct to the point that we quote it here :

" The answer so far as responsive to the bill, directly denying the matters alleged, not only makes an issue, but it is testimony in the case called for by complainant, proving the issue for defendant; and

it must be overthrown by the testimony of two witnesses, or the testimony of one witness and circumstances equivalent to another, or, at least, sufficient to make a preponderance of testimony in favor of complainant. Solicitors, generally, in this circuit seem to overlook the great disadvantages under which they often labor, in not waiving an answer under oath in equity cases, now that the complainant and defendant are themselves both competent witnesses, and can be *orally* examined under equity rule sixty-seven, where the complainant can get the evidence of his opponent fresh from him in person, under a sharp and pressing examination instead of having it deliberately shaped by, and cautiously arranged and shaded for him, by his solicitor at his leisure in his office."

The burden of proof is upon the complainant to establish infringement, and this burden is not sustained by the introduction in evidence of the patent. The introduction in evidence of the patent establishes, *prima facie*, the novelty and utility of the invention, but does not establish an infringement. Neither does the introduction in evidence of a nubia admitted to have been manufactured by the defendants establish an infringement, and before the defendants are compelled to answer, they are entitled to have pointed out wherein and in what respects the article manufactured by them contains the patented invention. The burden of proof being upon the complainants, it must be met ; in other words, the defendants' nubia must be shown to be an infringement by the defendants, and by at least one reputable witness ; otherwise the bill must be dismissed ; and this position is unanswerable where infringement is denied by an answer under oath.

This fact and this rule of practice his Honor seems entirely to have overlooked, and on this ground, also, a new trial should be ordered, and the appeal sustained.

As to Patent No. 10,388.

5. The design of this patent results from the peculiar construction of the fabric to which it relates. This peculiar construction " consists in providing the pillars of the fabric with more or less irregular, laterally projecting loops," and the design patented is the result of those " irregular laterally projecting loops," as stated in the specification, which impart to the fabric a puckered, wavy, purl-like appearance, that is, the puckered, wavy, purl-like appearance is given

to the fabric by reason of the more or less irregular, laterally projecting loops.

If the Court is to, as it must, confine itself to the appearance given by an examination of the drawings, certainly it is that the defendants' fabric has no resemblance whatever to it; they are totally unlike.

These more or less irregular, laterally projecting loops are "indicated in the photograph," as is clearly shown. No other construction is either shown or suggested. The claim is even more specific in its requirements of "irregular, laterally projecting loops" than the specification, as the words "more or less" are omitted from the claim, the language there being "irregular, laterally projecting loops."

The design of the patent is present only in fabrics of the peculiar construction referred to, and results from providing the pillars with irregular, laterally projecting loops; and by "irregular, laterally projecting loops" is meant loops projecting at irregular distances from the pillars; of this there can certainly be no doubt, for it is the only interpretation that can possibly be given to the language used. Should it be necessary, however, that interpretation may be confirmed by examination of the photographic representation, as the loops are there shown to project at irregular distances from the pillars; that is, they are loops of different lengths; first a short and then a long loop, and, so far as the patent is concerned, they must be so in order to produce the puckered, wavy, purl-like appearance, which is the design covered by the claim.

It was contended in the Court below that the description "irregular, laterally projecting loops" had reference to loops projecting at different angles; in other words, loops of equal length, equi-distant from the pillars, projecting at different angles. Such an interpretation, in view of the precise language of the specification, is impossible when we consider that in the specification the patentee says that the photograph indicates his peculiar construction of fabric and the design resulting therefrom, and this photograph shows and confirms the correctness of my interpretation, viz., that the language referred to means loops of *irregular lengths*. Had it been intended to describe a fabric, the pillars of which were provided with laterally projecting loops of equal lengths, but projecting from the pillars at different angles, the solicitor would not have used such precise language, nor have shown a view of a fabric which clearly had loops of irregular lengths; and also, it would then have stated, "loops projecting

in all directions from a common centre," or in all directions from the pillar, the loops being of equal lengths. The patent strictly considered is not a design patent, but a combination of construction and design, in other words, a peculiar construction from which a peculiar appearance results, and the appearance is due to and results entirely from the peculiarity of construction, so that there must be first the peculiar construction ; second, the appearance, viz.; a puckered, wavy, purl-like appearance resulting from that construction. It is not sufficient that the construction be present, for it might well be that the construction was present, and yet the result would not follow. In other words, it is by no means certain that the appearance would necessarily follow from the presence of the construction, but it is certain in order to constitute an act of infringement, that the appearance must result from the presence of the peculiar construction. A fabric having a puckered, wavy, purl-like appearance, without reference to its construction, would not infringe the patent, for the essential element of the claim is " irregular, laterally projecting loops ;" if they are regular, laterally projecting loops, then there would be no infringement.

This is so similar to the case of Harris vs. Allen, decided in 1883 by His Honor Judge BLODGETT, that it may be well to cite it here : In that case an invention in spring bed frames was held to be confined to a *wooden* frame, not infringed by an *iron* one, because the description of the construction of the spring bed could only apply to wood.

His Honor held :

Harris and others vs. Allen and others, 15 Fed. Rep., 106.

BLODGETT, J. :

" I do not think it necessary, however, to pass definitely upon the question as to whether these coiled suspension wires used by the defendants are the same as those described as forming part of the complainants' combination, as, in my opinion, Andrews' patent is limited to a " *wooden frame.*" That is, I think, he intended to use only a wooden frame, and to claim that only as a part of his combination. This may be a narrow construction of this patent, but it seems to me the only one allowable under the specifications and claims. If Andrews had intended to include a frame of any other material than wood, he, it seems to me, would have said a frame of any material, but preferably of wood, or in some way indicated that he did not intend to limit himself in regard to the material of which his frame was to be made. At least, if he had not intended to restrict himself to a

wooden frame, he would not have described a wooden frame so minutely and used the terms so frequently as he has done. The fair inference is that he thought the frame must be of wood in order to fully represent his invention.

"It was earnestly urged by complainants' counsel, on the hearing, that to hold this iron frame no infringement virtually destroys this patent, a prophecy which may, to some extent, prove true; but a patent, like a contract, must be so construed as to effectuate the intention of the parties, and I must say that it seems palpable to me that Andrews did not intend to claim anything but a wooden frame, and the United States did not intend to grant him anything else."

Just as in that case, the inventor always referred to his frame as a wooden frame, when it would have been very easy to have mentioned iron or any other equivalent had it occurred to him; so here the designer always refers to his loops as irregular, when it would have been easy to have used the word regular, had he thought of it, or had he supposed that regular loops might produce the desired effect.

And so just as in that case it was held that having emphasized the wooden, he was confined to wood, so in this case it should be held that having emphasized the irregular he should be confined to irregularity.

If the appellee's contention in the Court below be correct, then regular, laterally projecting loops would be loops all of which projected at the same angle, whether their lengths were regular or irregular; while irregular, laterally projecting loops would be those that projected at different angles—an absurdity of course, because it is self-evident that the same appearance would result in the use of "lofty yarns" if the lengths of the loops were the same whether they projected at the same or different angles. It is impossible to harmonize the photographic representation and the description and language of the specification and claim unless you give to the words "irregular, laterally projecting loops," their common meaning, viz., loops of irregular lengths, projecting laterally from the pillars.

In this connection we have a very forcible illustration of the correctness of the appellant's contention that the complainant has failed to make a case, in the absence of any fabric, sworn to or otherwise, representing the patent. Had the complainants introduced in evidence a nubia and proved the same to have been made in exact accordance with the fabric shown in the photograph of the patent, as they should have done, the Court then would have no difficulty in

construing the patent and finding no infringement.. As it is, the Court is bound to accept the photograph as it presents itself to the eye, and that certainly shows a fabric having loops of irregular lengths projecting laterally from the pillars, and this is most clearly shown in figure 2. The defendants' fabric consists of pillars provided with regular laterally projecting loops—that is, the loops are of equal length and project equi-distant from the pillars, so that the claim of the Jennings patent is not infringed, although the defendanfs' fabric may present a puckered, wavy, purl-like appearance.

The defendants' fabric does not have the peculiar construction, and as a necessary consequence cannot possibly have a peculiar appearance imparted or resulting from that peculiar construction. In fact, the defendants' fabric is directly the opposite of the complainants' patent, and is properly described as follows: "A fabric consisting of pillars which are provided with regular, laterally projecting loops, thereby imparting to the entire fabric the appearance which it presents." If the Jennings patent can be sustained as a design patent, the claim must be construed, by reason of the language used, precisely as in the case of a mechanical patent, and unless all the elements of construction are present, there is no infringement, although the appearance may be the same.

I think no one could take the description and photograph of design patent No. 10,388, and say that the defendants' fabric has any resemblance whatever to the eye to the fabric shown in the photograph; but the Court might readily if it had before it a fabric which was shown to be the fabric from which the photograph was taken, or one precisely the same in construction and appearance, say whether or not there was any resemblance.

And I venture to say that had such a fabric been presented to this Court for comparison it would quickly have decided that there was no sort of identity of the defendant's article with the complainant's patent.

Therefore the appeal should be sustained as the finding of infringement falls as to one of the patents in the suit.

As to Design Patent No. 10,448.

6. This patent is void for want of novelty. Certainly no new effect is produced by having the fringes disconnected, and if the appellee's contention in the Court below as to patent No. 10,388 be correct,

then precisely the same construction is shown in that patent, which is a prior patent. It is of no consequenee that in that patent the material is joined together in meshes, while to make the fringe in patent No. 10,448, the material is simply run out straight, not joined together, and cut off to form the fringe.

The drawing shows, and the specification, description and the claim are for a disconnected fringe—that is, a separate and distinct fringe—as an article of manufature to be placed upon and used in connection with fabrics of different kinds, and such is the case in the photographic representation, and the specification so states : " A represents the lace fabric, of usual kind, B B are the disconnected fringes applied thereto "—that is, the fringe manufactured and sold as a separate article. Then he proceeds to describe the construction of the fringe, and in conclusion says : "The fringes are arranged in series of rows and suspended from the lace fabric." The defendants do not infringe this patent. They have no disconnected fringes. They form the fringe by ceasing to join the strips of the fabrics in meshes and letting it run straight for a certain distance, so that when severed in proper lengths it forms the fringe. This in no sense can be said to be a disconnected fringe. It is precisely the opposite, and, as the claim is limited to a disconnected fringe, there can be no infringement.

It is to be noticed that this patent distinctly states that the lace fabric to which the fringe is to be applied is of " usual kind." This means, of course, any lace fabric to which such fringe could be applied. What novelty of design could be secured by attaching a new fringe to a very common fabric we fail to see, because, of course, the main appearance as a design would be due to the fabric and not to the super-imposed fringe. Certainly, at most it could be but a new design for a fringe, and not a new design for a fabric provided with a fringe. But in this case the fringe is not new, for it is common knowledge that fringes have been made time out of mind with loops on both sides of a central stem. Even if the fringe were of novel construction, which it is not, it would be rather the subject of a patent for invention rather than for design. And lastly, to attach such fringe to such fabric even in a novel way, which this is not, could hardly constitute a novel design either for a lace fabric or for a fringe, or for a lace fabric provided with a fringe.

It would seem superfluous to enlarge upon this question.

It would seem as if the Court could almost take judicial knowledge of the lack of novelty of this design, and evidently the appeal should be sustained.

As to Master's Report.

7. It would seem to be proper to say a few words as to the Master's Report.

This report in both cases is based upon a license fee for *both* patents conjointly (see Record, p. 22, fol. 59, of No. 152, and p. 22 fol. 79, of No. 153).

If, therefore, either of the patents is void, or is not infringed, there would be no liability for that patent, and the Master's Report should be set aside for lack of evidence, as by well-settled law a license fee for two patents is not a license fee for one of them.

CONCLUSION.

8. It is, therefore, respectfully submitted that the appeal should be sustained, because it appears.

First. That the Court below had no evidence whatever before it entered its interlocutory decree to determine the question of infringement.

Second. That the design patents Nos. 10,388 and 10,448 are of such character that they are peculiarly dependent upon testimony of identity in order to make out a case of infringement.

Third. That the question of infringement in these cases cannot be determined by comparison of defendant's nubia and the photo-lithographic drawings of the patent.

Fourth. That in the absence of testimony the answer of defendants made under oath denying the infringement conclusively establishes that they do not infringe the patents in the suit.

Fifth That design patent 10,388 is not infringed.

Sixth. That design patent No. 10,448 is void for want of novelty.

SEVENTH. That the Master's report in both cases should be set aside for lack of evidence of an established license fee.

EIGHTH. That for each and all of the errors assigned, the final decrees herein should be reversed and the appeal sustained with costs.

Respectfully submitted,
JOHN R. BENNETT,
Attorney for Appellants.

New York, January 12, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Nos. 152 and 153.

HENRY R. KIBBE, ET AL., *Appellants*, *vs.* A. G. AND W. P. JENNINGS.	**No. 152.**
THOMAS DOLAN, *Appellant*, *vs.* A. G. AND W. P. JENNINGS.	**No. 153.**

BRIEF ON BEHALF OF THE APPELLEES.

ARTHUR v. BRIESEN,
Attorney for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1886.

Nos. 152 and 153.

HENRY R. KIBBE, ET AL,
Appellants,

vs.

ABRAHAM G. JENNINGS AND
WARREN P. JENNINGS.

THOMAS DOLAN,
Appellant,

vs.

ABRAHAM G. JENNINGS AND
WARREN P. JENNINGS.

BRIEF ON BEHALF OF THE APPELLEES.

These suits were brought by the appellees, the complainants below, to restrain the defendants from infringing upon Design Patents Nos. 10,388 and 10,448, that were

granted to the two appellees respectively and afterwards assigned to them jointly.

The patent No. 10,388, which is dated January 1, 1878, was granted for the term of fourteen years, and seeks to cover a design for a lace purling, which is a lace fabric of which the pillars are provided with irregular, laterally projecting loops.

The patent No. 10,448 was issued February 12, 1878, for the term of seven years, and seeks to cover a design for a lace fabric having disconnected, doubly looped fringes, each fringe having loops at both sides of a central stem or rib.

The suit in No. 152, *versus* Kibbe and others, is against the sellers, that in No. 153, *versus* Dolan, against the manufacturer, of the alleged infringing fabric. The answer of Mr. Dolan in No. 153 admits this, admitting also that Dolan defends the Kibbe suit (see fol. 45, p. 13, Record in No. 153). The same answer admits also (see top of page 13, Record) that Mr. Dolan's firm has been "*engaged* "*in manufacturing a fabric consisting of pillars provided* "*with* REGULAR, *laterally projecting loops; that is, having* "*loops projecting to an* EQUAL DISTANCE *on each side of* "*the pillars thereof, but denies that such fabric in-*"*fringes the said Jennings Patent* No. 10,388."

The answer of Dolan likewise admits (p. 13) that the complainants filed their bill of complaint against Henry R. Kibbe and others for infringement of said two design patents, and "*that after argument a preliminary injunc-*"*tion was granted by the Court and issued against the* "*defendant, as alleged in the bill of complaint, enjoin-*"*ing him from continuing to sell a fabric the pillars* "*whereof are provided with irregular, laterally project-*"*ing loops.*"

The complainants, in their *prima facie* proofs, confined themselves in each of these two suits to an offer of the two patents in evidence, of the assignments, and of the infringing nubias, which the defendants' counsel admitted to be of the manufacture of the defendant Dolan, and to have been sold by the defendants Kibbe *et al.*

The defendants took no proofs in either suit. The suit against Kibbe came to final hearing before his Honor

Judge Blatchford, on the sixth of January, 1882, over eight months after the complainants had rested their *prima facie* case, and appears to have been argued principally upon the question of the sufficiency of the complainants' opening proofs. Judge Blatchford's opinion will be found on page 17 of the Record in No. 152.

The case against Dolan came on for argument before Judge Wallace on the seventeenth of October, 1882, over thirteen months after the complainants had rested their *prima facie* proofs. Judge Wallace did not write an opinion, and it does not appear upon what grounds he based his decision in favor of complainants.

Both cases were referred to a master, Mr. Deuel, who reports in the Kibbe case (p. 22, Record in No. 152), that the defendants received on consignment from Thomas Dolan & Co. 2,707 dozen purl lace nubias *which infringed complainants' patent*, and that they sold $2,281\frac{5}{12}$ dozen, returning the remainder to Dolan; that the complainants' established license fee is fifty cents per dozen of said nubias, and that, therefore, the complainants are entitled to the recovery of $1,104.20, with interest thereon, in all $1,154.62.

In the Dolan case the same Master finds (see p. 22, Record in No. 153), that the defendant had manufactured and sold $4,295\frac{9}{12}$ dozen purl lace nubias *which infringed complainants' patent;* that of this number $2,281\frac{5}{12}$ dozen were sold by the defendants Kibbe *et al.*, against which complainants have a decree for $1,154.62; that by stipulation of counsel damages are to be assessed in the Dolan case for the whole amount of nubias manufactured and sold, and a decree entered therefor, and that if, at any time before the satisfaction of said decree, the decree against Kibbe *et al.* is paid or satisfied, in whole or in part, the amount so paid shall be considered as credited upon and to be deducted from the decree in the Dolan case for the corresponding number of nubias covered by such payment. The report then finds that the complainants' license fee being fifty cents per dozen, the complainants are entitled to recover from the defendant Dolan $2,157.88, with interest, in all $2,303.95.

Upon these reports coming in, no exceptions being filed,

final decrees were entered in both cases (see pages 24, both Records).

Inasmuch as the defendants did not except to the reports of the Master, it would seem that they are bound by his conclusions, and that they are consequently estopped from denying that Kibbe & Co. sold 2,281 dozen and Dolan manufactured 4,295 dozen nubias which infringed upon complainants' patents.

It may well be questioned, therefore, whether defendants are in position to claim that the *final* decree from which this appeal is taken, and which amongst other things is based upon the Master's report, is not based upon proof satisfactory to the Master and to the Court which made the *final* decree, that the goods manufactured and sold by defendants were infringements of complainants' patents.

Appeals to this Honorable Court being taken from final decrees, *all* the proceedings had before the entry of the final decree will be considered by this Court. The appellant cannot stake its case upon a portion only of these proceedings. In other words, if the defendants denied infringement before the Court entered its interlocutory decree, but admitted it before the master, and by failure to except to the master's report, the first denial ought not to avail them upon this appeal.

ARGUMENT.

The only question which can be presented on this appeal is whether or not infringement of complainants' patent has been sufficiently proved.

The record does not show all the proof adduced on that point, because the proceedings before the Master are not incorporated into the record. Sufficient appears to show, that, on motion for a preliminary injunction and full argument, and on affidavits and papers filed on behalf of both parties, a preliminary injunction was granted by the Court below. Thus, before the final hearing the court had already been advised of the issues to an extent sufficient to enable it to adjudicate that the defendants' struc-

ture was an infringement of complainants' patents. The same court afterwards, on the so-called "final hearing," was presented with the same patents and infringing articles, and in the absence of countervailing proof made the comparison which the pleadings invited it to make, and found the defendants' nubias to be infringements of the patents.

By interlocutory decree the Court then ordered as follows (see p. 20, Record in No. 152, and p. 21, Record in No. 153):

"*And it is further ordered, adjudged and decreed that* " *the complainants do recover from the defendants (naming* " *them) the profits, gains and advantages which the said* " *defendants have derived, received or made, by reason of* " *the infringement of the complainants' exclusive rights* " *under said two design Letters Patent by* ANY *manufac-* " *ture, use or sale of lace fabrics containing said inven-* " *tions and designs, or either of them.* * * * * *

"*And it is hereby* * * * *referred to Joseph M.* " *Deuel, one of the Masters of this Court, to ascertain,* " *take and report the quantity of lace fabrics made and* " *the quantity sold by said defendants in violation of said* " *two design Letters Patent, or either of them, &c.*"

It will be seen from reference to these interlocutory decrees that the Master was not referred by the decree to any particular exhibit by which he should be guided in his effort to ascertain what fabrics are and what are not infringements of said patents. *One* form of infringement, it is true, had been shown to the Court and had been adjudicated upon, but after this the Master was to ascertain *every* character of infringement by *any* manufacture or sale of nubias, and infringements of *either* patent, the one or the other.

The Master thereupon, finding that the defendants had made certain particular numbers of fabrics which infringed the patents, it seems that it became the duty of the defendants to except to his finding of infringement if they wished to disclaim infringement on this appeal, and to have insisted upon this exception at the time the Master's report came up for confirmation. But even if that was not the defendants' duty, it would appear that, in order to have this

Court review the correctness of the final decree below, defendants should have produced the proceedings before the master, so that this Court might know *how* the Master came to ascertain what fabrics were and what were not infringements of the patents here in suit. We cannot perceive how the appellate tribunal can be put in position to reverse the final decree of the Court below for error, if it is not given the opportunity of inquiring into the proceedings that led to said final decree.

But even if this were an appeal from the interlocutory decree merely, and not one from the final decree, it would seem that no reason for the reversal of the interlocutory decree can be shown. The pleadings distinctly explain the defendants' position in respect to the construction of the first patent No. 10,388. Mr. Dolan in his answer admits that he is the manufacturer of, and that the Kibbes are the dealers in, fabrics having pillars provided with regular, laterally projecting loops, and then explains this admission by the following statement: "*That is, having loops projecting to an equal distance on each side of the pillars thereof.*" And the answer further admits that, nevertheless, on a full argument and proofs, an injunction was granted restraining the defendants from making irregular, laterally projecting loops, which Dolan had manufactured.

Hence, this answer shows that, although the fabrics made by the defendants had loops of equal length, they were, nevertheless, by the Court construed to be the irregular, laterally projecting loops of the patent.

The exhibits infringing nubias speak for themselves. They have loops that project laterally, but these loops do not project laterally in regular order, as do the loops in a Brussels carpet, for example. They project in an irregular order laterally, that is, from the two faces, so as thereby to produce a peculiar purly effect. This is precisely what the patent No. 10,388 claims to be the effect of these irregular, laterally projecting loops. And the Court was therefore right, it seems to us, in deciding, as in substance it did, that although the loops in the infringing nubias are, or may be, of equal, or substantially equal lengths, they nevertheless are the irregular, laterally projecting loops of the patent, because they project in irregular order from

the faces of the fabric, thereby imparting to the fabric a puckered, wavy, purl-like appearance. The word "purl" is in Webster's Dictionary defined to mean "elevated or "raised in circles, ripples, or a wave-like appearance."

The language of the specification, moreover, precludes any construction thereof which would refer to the length of the loops. Had the patent intended to specify that the loops are not of like lengths the word *irregular* would not have expressed that intent. We speak of *equal* or *unequal* lengths, but not of things *irregular* as to length. Moreover, the photograph which attaches to the original patent (that in the record of this Court being a very imperfect reproduction from a reproduction, and therefore no criterion of that which is in the patent) distinctly shows that the loops project in all sorts of directions, some to the right, some to the left, some forward, with all degrees of variation in the multitude of directions in which said loops are placed. Was it not sufficient then for the complainants to present to the Court for inspection and comparison said patent No. 10,388 and the nubias claimed to be an infringement thereof? Dobson v Dornan 118 U.S. 16

The Court was finally to make that comparison under all circumstances. What, if any, testimony could have assisted the Court in arriving at a correct decision on the question of infringement? Expert testimony, according to the dictum of this Court in Gorham Co. *vs.* White, 14 Wallace, 528, was out of the question. To produce persons on one side who would say that the fabric is like the patent, and persons on the other side who would claim it to be unlike the patent, would leave the question finally before the Court precisely where it was without such testimony.

This Honorable Tribunal in the Powder Company cases has announced that in certain classes of patents in which the specifications are readily comprehended, the Court will undertake to consider or compare the specifications without reference to expert or explanatory testimony. In case of a design patent this inspection is the easier, it seems to us.

The question, moreover, before the Court was not whether what the defendants made was like or unlike what the complainants made, but whether what the de-

fendants made was like that which the patents claimed in behalf of the complainants. To bring an ordinary purchaser as a witness would not have helped the Court in solving that question, because an ordinary purchaser does not read the patent.

The language of this Court in Milwaukee, etc., Railway Co. *vs.* Kellogg, 4 Otto, p. 472, seems to apply to the present matter. The Court there says:

"*The subject of proposed inquiry was a matter of com-*
"*mon observation, upon which the lay or uneducated mind*
"*is capable of forming a judgment. In regard to such mat-*
"*ters, experts are not permitted to state their conclusions.*
"*In questions of science their opinions are received, for*
"*in such questions scientific men have superior knowledge,*
"*and generally think alike.*"

Or, as Judge Grier, in Adams *vs.* Jones, 1 Fisher, p. 531, says:

"*We have had ocular demonstration, by an examina-*
"*tion of the defendant's admitted manufactures that they*
"*palpably infringe the invention patented to complainant.*
"*When we have the things before our eyes we want no*
"*opinions of mechanics or experts, and give no further*
"*reason for our opinion than that 'we've* SEEN *and surely*
"*ought to* KNOW.'"

In Seymour *vs.* Osborne, 11 Wallace, p. 559, this Court says, that the true test of infringement is the comparison of the complainant's patent with the defendant's device. This test these complainants have enabled the Court below to apply, and therefore, in the absence of contrary proof, the Court finding, that by virtue of that test infringement is proven, no reason seems to exist for holding that the Court should have required further and additional evidence before it undertook to make the comparison.

That the patent No. 10,448, the second patent in suit, has been infringed in the defendant's structure needs no argument upon our part. The claim of that patent is for a fabric having disconnected, doubly looped fringes, the loops projecting from both sides of a central stem or rib.

Such fringes appear on the defendants' structure, and any person can see and find them there.

In view of all these considerations, it appears:

FIRST.—That the Court below had sufficient evidence, before it entered its interlocutory decree, to determine the question of infringment.

SECOND.—That the evidence presented to the Master not being in the record of these appeals, it must be assumed that sufficient evidence was before the Master to enable him to determine the extent and character of the infringement.

THIRD.—That whatever rights the defendants had to dispute the conclusions of the Master as to the fact and extent of the infringement were waived by failure to except to his report.

FOURTH.—That the defendants' nubias contain the inventions that are claimed in complainants' patents.

FIFTH.—That, therefore, no error can be found in the final decrees, and hence

That the same should be confirmed.

Respectfully submitted,

ARTHUR v. BRIESEN,
Attorney for the Appellees.

NEW YORK, November 9, 1886.